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IN THE

Supreme Court of the United States

SL SERVICE, INC.

and

AMERICAN SHIP MANAGEMENT, LLC,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit violated basic principles of jurisprudence by improperly overextending the holding of *Texaco Marine Service, Inc. v. United States*, 239 F.3d 1366 (Fed. Cir. 2001) that two foreign shipyard expenses, *i.e.*, post-repair cleaning and protective coverings used in conjunction of repair work, constituted dutiable repair expenses under 19 U.S.C. § 1466(a), to render all foreign shipyard expenses *per se* dutiable?

2. Whether the misapplication of *Texaco Marine Service, Inc. v. United States*, by the United States Court of Appeals for the Federal Circuit led the court to misinterpret a key provision of the Customs Modernization Act, 19 U.S.C. § 1625(c), by concluding that Customs did not render "decisions" interpreting the vessel repair statute, 19 U.S.C. § 1466(a), which would trigger the mandatory notice and comment requirements of 19 U.S.C. § 1625(c) prior to modifying or revoking prior interpretive rulings or decisions relating to the dutiability of a myriad of shipyard expenses?

3. Whether the United States Court of Appeals for the Federal Circuit erred in failing to recognize Customs' "decisions" in this case in view of *United States v. The Mead Corp.*, 185 F.3d 1304 (1999), *cert granted*, 530 U.S. 1202 (2000), where the Government seeks controlling weight deference for the same type of decision?

RULE 29.6 LISTING

SL Service, Inc., formerly known as Sea-Land Service, Inc. is a wholly-owned subsidiary of CSX Corporation. American Ship Management, LLC, formerly known as American President Lines, Ltd., is wholly-owned by Patriot Holdings, LLC.

PARTIES TO THE PROCEEDING

The only parties currently before the Court are the United States, SL Service, Inc., and American Ship Management, LLC.

Petitioners' case was designated a "test case" by the U.S. Court of International Trade ("CIT").

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Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

SL Service, Inc. (formerly known as Sea-Land Service, Inc.) and American Ship Management, LLC (formerly known as American President Lines, Ltd.), petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") entered on February 16, 2001.

OPINIONS BELOW

The United States Court of International Trade entered a final judgment on September 23, 1999, and the court's decision is reported as *Sea-Land Service, Inc. v. United States*, 69 F. Supp.2d 1371 (Ct. Int'l Trade 1999) (App. B, *infra*). The United States Court of Appeals for the Federal Circuit affirmed that decision in its opinion, reported at 239 F.3d 1366 (Fed. Cir. 2001) (App. A, *infra*).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on February 16, 2001. The time for filing a petition for a Writ of Certiorari is until May 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

1. 19 U.S.C. § 1625(c) provides:

A proposed interpretive ruling or decision which would—

> (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
>
> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

2. 19 U.S.C. § 1466(a) provides, in pertinent part:

The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of

such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

STATEMENT OF THE CASE

The case concerns whether the United States Court of Appeals for the Federal Circuit erred by failing to require the U.S. Customs Service to comply with the mandatory notice and comment requirements of 19 U.S.C. § 1625(c). The statutory provision at issue was enacted as part of an overhaul of U.S. Customs laws, passed as part of the North American Free Trade Implementation Act on December 8, 1993, and is commonly referred to as the "Customs Modernization Act." Pub. L. 103-182 § 623 (1993). It substantially amended section 625 of the Tariff Act of 1930 to "require that a ruling modifying or revoking an existing ruling be first published in the Customs Bulletin for notice and comment" in order to "provide the assurances of transparency concerning Customs rulings and policy directives through publication in the Customs Bulletin." H.R. Rep. No. 103-361, 1st Sess. at 124 (1993). As noted by the U.S. Court of International Trade, the statute is clear on its face that the notice and comment requirements are mandatory. *American Bayridge Corp. v. United States*, 35 F. Supp.2d 922 (Ct. Int'l Trade 1998), *rev'd on other grounds*, Slip Op. 99-1228, *available on* 1999 WL 997303 (Fed. Cir. 1999)(unpublished).

This case relates to another case decided by the Federal Circuit, *Texaco Marine Services, Inc. v. United States*, ("*Texaco*"), 44 F.3d 1539 (Fed. Cir. 1994), where the court decided that two repair charges incurred in a foreign shipyard to a U.S.-flag vessel, such as those operated by petitioners, constituted dutiable "expenses of repairs" under the vessel repair statute, 19 U.S.C. § 1466(a). The court, upon ruling on the specific items, construed the vessel repair statute generally to decide whether a particular charge should be considered dutiable as an "expense of repair." In particular,

the court recited the following, which has become known as the "but for" test:

> [T]he language "expenses of repairs" is broad and unqualified. As such, we interpret "expenses of repairs" as covering all expenses (not specifically excepted in the statute) which, *but for* dutiable repair work, would not have been incurred. Conversely, "expenses of repairs" does not cover expenses that would have been incurred even without the occurrence of dutiable repair work.

44 F.3d at 1544 (emphasis added).

Subsequent to the issuance of the Federal Circuit decision in *Texaco* the Customs Service published notice in the Customs Bulletin on February 8, 1995 (HQ memorandum 113308, 29 *Cust. B. & Dec.* 59), providing the *Texaco* decision and explaining that Customs would follow the *Texaco* "but for" analysis. Specifically, Customs indicated that it would impose duties on "expenses of repairs" provided they pass the "but for" test for all unliquidated entries. Representatives of petitioners met with Customs officials on February 22, 1995, to discuss the ramifications of the *Texaco* decision, and Headquarters Ruling Memorandum ("HQ Memorandum") 113308, as well as the applicability of the newly enacted statutory provision, 19 U.S.C. § 1625(c), to new interpretations of the statute to charges not specifically considered in *Texaco*. On March 3, 1995, Customs issued HQ memorandum 113350 (published in the Customs Bulletin on April 5, 1995 (29 *Cust. B. & Dec.* 24)), amending its position on the effective dates set forth in the first notice. Specifically Customs instructed its field offices that all entries involving the two cost items at issue in *Texaco* should be liquidated as dutiable and for other charges that would involve a question of interpretation of the statute Customs should apply the "but for" test for all entries filed after the date of the *Texaco* decision, *i.e.*, December 29, 1994. *Sea-Land*, 239 F.3d at 1369.

Petitioners SL Service, Inc. ("Sea-Land") and American Ship Management, LLC ("ASM"), filed vessel repair entries, containing various charges other than post-repair cleaning or protective coverings used in conjunction with repair work, and Customs assessed duties, applying the "but for" test which had the effect of modifying or revoking prior Customs rulings. Sea-Land and ASM filed administrative protests pursuant to 19 U.S.C. § 1514, urging Customs to comply with § 1625(c) before modifying or revoking rulings covering such charges. However, Customs denied Sea-Land and ASM's protests and refused to publish notice and allow for comment as required by 19 U.S.C. § 1625(c). Sea-Land and ASM filed separate actions before the U.S. Court of International Trade, which has exclusive jurisdiction to consider challenges to protest denials under 28 U.S.C. § 1581(a). These actions were consolidated on May 20, 1997. The consolidated action was designated as a test case for all further entries pursuant to USCIT R. 84(c). It was stipulated that none of the duties under protest involved post-repair cleaning and protective coverings, the charges involved in *Texaco*. *Sea-Land*, 239 F.3d at 1370. The test case involved a variety of charges such as transportation and travel. On July 7, 1998, Sea-Land and ASM jointly moved for summary judgment to review the correctness of Customs' refusal to provide notice and allow comment. On December 7, 1998, Defendant United States cross-moved for summary judgment.

The U.S. Court of International Trade granted Defendant's cross-motion for summary judgment, holding that § 1625(c) was not applicable because "Customs did not issue a proposed interpretive ruling or decision within the meaning of 19 U.S.C. § 1625(c)." Specifically, the court concluded that the decisions referred to by plaintiffs "were not proposed interpretive rulings or decisions; instead, such decisions and memoranda merely implemented the judicial mandate of *Texaco*." *Sea-Land*, 69 F. Supp.2d at 1381. Thus, the court

declined to rule that the Customs Service had made "decisions" that would trigger the notice and comment provision.

On February 16, 2001, the U.S. Court of Appeals affirmed the decision of the U.S. Court of International Trade. Unlike the Court of International Trade, which ruled that Customs did not make any decisions, the court avoided the question of whether Customs rendered any "interpretive rulings" or "decisions" at all. Rather, the court stated that it would "assume, without deciding, . . . that Customs' actions with respect to Sea-Land's vessel repair expense entries are 'interpretive rulings[s] or decision[s]' under § 1625(c)." *Sea-Land*, 239 F.3d at 1372. According to the court, this would meet the first requirement for the invocation of the notice and comment statute. However, it based its decision to affirm the decision of the Court of International Trade upon its conclusion that "[t]his court's decision in *Texaco* in late 1994 had the effect of modifying all of Customs previous rulings, decisions, and treatment of vessel repair expenses under § 1466(a). Since Customs' actions do not meet the second condition under section 1625(c), the notice and comment requirements described in § 1625(c) were not triggered." *Id.* The Federal Circuit explained that:

> It was this court in *Texaco* that modified the treatment of vessel repair expenses under § 1466(a). We "clarif[ied]" the judicial interpretation of 19 U.S.C. § 1466(a) in *Texaco*, explaining that, based on the plain language of the statute, "expenses of repairs" in § 1466(a) meant those expenses that would not have been incurred "but for" the ship's repair. *Texaco*, 44 F.3d at 1546. With this explicit interpretation of § 1466(a), *Texaco* wiped the slate of decisions under § 1466(a) clean, requiring the dutiability of *all* vessel repair expenses to be determined by the "but for" test. Customs is required to follow and apply the "but for" test.

Sea-Land, 239 F.3d at 1372-1373.

Petitioners respectfully suggest that the Federal Circuit erred when it refused to address the question of whether Customs made any "decisions" that would trigger section 1625(c). It also erred in finding that its decision in *Texaco* "wiped the slate of decisions under section 1466(a) clean" requiring Customs to follow the "but for" test. Such a decision is unprecedented in that it gives the *Texaco* decision the effect of wiping out an entire body of administrative law and further gives Customs carte blanche to interpret the statute without being subject to the administrative process for review provided by Congress.

REASONS FOR GRANTING THE PETITION

This petition for a Writ of Certiorari should be granted for the following reasons:

I. THE FEDERAL CIRCUIT'S DECISION IS AT ODDS WITH BASIC PRINCIPLES OF JURISPRUDENCE

The fundamental flaw in the Federal Circuit's decision relates to its assumption that by rendering its decision in *Texaco Marine Services, Inc. and Texaco Refining and Marketing, Inc. v. United States*, ("*Texaco*"), 815 F. Supp. 1484 (Ct. Int'l Trade 1993) the court, and not Customs, modified the treatment of all vessel expenses under § 1466(a). The court takes this view because, as it states: "*Texaco* wiped the slate of decisions under § 1466(a) clean, requiring the dutiability of *all* vessel repair expenses to be determined by the 'but for' test." *Sea-Land*, 239 F.3d at 1372. That decision is at odds with basic principles of jurisprudence, because the *Texaco* decision could not "wipe the slate of decisions under § 1466(a) clean," as ruled by the Federal Circuit here. Courts decide cases by applying the law to specific facts. *Texaco* decided the correctness of Customs' determination of the dutiability of two specific charges, *i.e.*,

post-repair cleaning and protective coverings used in conjunction of dutiable repairs, under the vessel repair statute. It did not direct the Customs Service as to the necessary outcome of every fact pattern it would encounter in liquidating vessel repair entries; nor did it make the charges at issue in this case *per se* dutiable. The *Texaco* court did, however, provide guidance as to how Customs should interpret the vessel repair statute to determine whether a particular charge is a dutiable "expense of repair."

Petitioners do not contest the applicability of the "but for" analysis for purposes for determining whether a particular expense is a dutiable "expense of repairs" under the vessel repair statute. *Texaco* itself dealt with the application of the "but for" test to two types of vessel repair expenses—cleaning and protective coverings costs. However, under principles of *stare decisis* the precedential weight of *Texaco* is limited. Contrary to its decision below, the Federal Circuit's determination that the expenses before it in *Texaco* were dutiable in no way *mandates* a similar finding regarding the charges at issue in the instant case. Rather, the Customs Service was required to apply the "but for" test to analyze whether particular charges under particular circumstances constitute dutiable "expenses of repairs." Thus, it was *Customs* that made decisions or rulings when it issued protest denials, denials of applications for further review, and protest review decisions that modified or revoked prior contrary Customs rulings as to the various charges. This is the fundamental error made by the court which sanctions the Customs Service's failure to comply with § 1625(c).

A review of the *Texaco* decision itself is necessary in order to comprehend the limits of that decision and to fully understand the error made by the Federal Circuit in overextending the decision to violate basic principles of jurisprudence. *Texaco* involved an American-flag oil carrier, the S.S. TEXACO GEORGIA, which underwent certain repairs

and alterations at the Hellenic Shipyards Co. in Athens, Greece. The issue presented involved whether two categories of charges: (1) post-repair cleaning and (2) protective coverings, fell within the phrase "expenses of repairs" contained in the vessel repair statute, 19 U.S.C. § 1466(a). Under that statute, if the charges constituted "expenses of repairs" they are subject to a 50 percent *ad valorem* duty. The expenses at issue in *Texaco* were for cleaning up after repair work to the boiler, boiler room and the cargo tanks and for coverings to protect heating coils during grit-blasting.

Texaco challenged Customs' assessment of duty to the post-repair cleaning and protective covering expenses in the U.S. Court of International Trade. The court held that those expenses were dutiable, reasoning:

> As a general rule, if the cleaning procedures "are incident to or accompany repairs, they will be held dutiable; if conducted without regard to repairs, they are not dutiable." Furthermore, if the cleaning operations were an "integral" or a "necessary" part of the dutiable repairs, then the cleaning is also dutiable.
>
> The cleaning in this case was indeed an integral part of the repair process since the cleaning would not have been necessary *but for* the repairs. Therefore, the cleaning costs are properly dutiable under the statute and this Court denies plaintiffs' motion and grants defendant's cross-motion for summary judgment as to this issue.
>
> * * *
>
> The protective coverings, however, are an integral part of the repair process and would not have been necessary *but for* the repairs. Therefore, by the same reasoning that the cost of the cleaning is dutiable, the cost for the protective coverings are dutiable as they are an integral part of the repair process.

Texaco, 815 F. Supp. at 1486 (citations omitted)(emphasis added).

The Federal Circuit approved the "but for" test, stating the following as its rationale:

> [T]he language "expenses of repairs" is broad and unqualified. As such, we interpret "expenses of repairs" as covering all expenses (not specifically excepted in the statute) which, *but for* dutiable repair work, would not have been incurred. Conversely, "expenses of repairs" does not cover expenses that would have been incurred even without the occurrence of dutiable repair work.

Texaco, 44 F.3d at 1544 (emphasis added).

Thus, the Federal Circuit decision made no determination with regard to the dutiability of the particular expenses at issue in this case. To the extent that other expenses, such as dry-docking, lighting, transportation and travel, were discussed in *Texaco*, they were discussed in the context of previous cases to illustrate a point or further demonstrate the validity of the court's newly enunciated "but for" test for interpreting the statute. Thus, as the Federal Circuit "assumed," Customs would have to make decisions by applying the "but for" test in the future. The court's conclusion that it was the court's decision in *Texaco*, and not Customs' decisions, that affected prior practice cannot withstand the test of logic or basic principles of jurisprudence. *Texaco* disposed of the dutiability of two charges in the specific context of the *Texaco* case. For these charges, *Texaco* mandated the outcome; for other charges the court directed Customs to interpret the statute and apply the "but for" test. Customs, in applying the "but for" test in a way which was contrary to its prior rulings, and not the Federal Circuit, modified or revoked prior rulings here. There is no dispute that Customs did this without meeting the mandatory requirements of section 1625(c). As a result, its actions here were done without the public transparency and scrutiny envisioned by Congress. The court's approval of Customs' actions here will impede the administration of an important new statute.

II. THE FEDERAL CIRCUIT'S DECISION PRESENTS AN IMPORTANT ISSUE OF CONSTRUCTION WITH REGARD TO THE ADMINISTRATION OF THE CUSTOMS MODERNIZATION ACT (19 U.S.C. § 1625(C))

The Federal Circuit's decision presents a critical issue with regard to the administration of a relatively new statutory provision, 19 U.S.C. § 1625(c), which is an essential component of the Customs Modernization legislation passed in 1993 as part of the North American Free Trade Implementation Act. *American Bayridge*, 35 F. Supp.2d at 935-941. Specifically, this decision allows Customs to avoid the mandatory notice and comment requirements for modifying or revoking existing rulings, thereby upsetting the statutory framework for the issuance of Customs rulings. Because the court's interpretation disturbs the Congressionally-mandated process for changing prior interpretations or decisions, it will inevitably lead to more litigation rather than resolution via the administrative process established by Congress. In fact, that is exactly what occurred in this case. Allowing Customs to proceed in this manner gives the agency unbridled discretion to modify or revoke its prior interpretations. As such, the court's decision presents a serious hindrance to the administration of the Customs laws, as amended by Congress in the Customs Modernization Act. Early correction of the Federal Circuit's interpretation is required to ensure that the statute is properly implemented by the Customs Service. It is especially important as the impact of the decision affects all parties, not only U.S.-flag ocean carriers, subject to the administration of U.S. Customs laws and affected by Customs' "interpretive rulings" or "decisions."

The Customs Modernization Act (the "Mod Act"), which became effective December 8, 1993, about a year before the Federal Circuit's decision in *Texaco*, established additional

requirements for Customs in implementing new interpretive rulings or decisions. Specifically, 19 U.S.C. § 1625 (c) provides that:

> A proposed interpretive ruling or decision which would—
>
> > (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
> >
> > (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
>
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

Prior to enactment of the Mod Act in 1993, there was no statutory requirement for Customs to consider public comment before issuing rulings that would modify or revoke earlier rulings.[1] The legislative history of the Mod Act states that the statutory amendment was designed to "require that a ruling modifying or revoking an existing ruling be first published in the Customs Bulletin for notice and comment" and that such new procedural safeguards were enacted to "provide the assurances of transparency concerning Customs

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[1] However, where there is an established and uniform practice of a lower duty or no duty, Customs was, and still is, required to provide notice in the *Federal Register* under 19 U.S.C. § 1315(d) prior to imposing a higher rate of duty.

rulings and policy directives through publication in the Customs Bulletin." H.R. Rep. No. 103-361, 1st Sess. at 124 (1993).

The Court of International Trade, in *American Bayridge Corp. v. United States*, found that under the analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the statutory language of section 1625(c) in itself would suffice to establish that the notice and comment requirements are mandatory as Congress made its will absolutely clear. As discussed herein, Customs made "decisions" as to the dutiability of the various charges under the vessel repair statute. Whether these "decisions" are consistent with the vessel repair statute or *Texaco* remains untested because of Customs' refusal to comply with the mandatory notice and comment requirement. Moreover, the court has allowed Customs the ability to escape public scrutiny, as envisioned by Congress, by its erroneous determination that it was the court in *Texaco* and not Customs that dictated the duty assessments. *American Bayridge*, 35 F. Supp.2d at 935, also held that the statute gives not only the parties directly involved in the ruling or decision rights but it gives "interested parties an opportunity to submit . . . comments on the correctness of the proposed ruling or decision." The inconsistency between these Federal Circuit decisions constitutes another reason why this Court should review this case.

Early correction of the court's interpretation regarding the applicability of section 1625(c) is required to ensure that the statute is properly implemented by the Customs Service. The notice and comment requirement is an important component of the 1993 Customs Modernization Act as it is provides the necessary transparency for the trade community, which includes among others importing companies, transportation companies, brokerage firms, to take on greater responsibility in Customs matters in order to enable Customs to automate

and facilitate trade. *American Bayridge Corp. v. United States*, 35 F. Supp.2d at 938-939. Customs' failure to publish has led to this prolonged litigation to resolve the propriety of Customs underlying actions which remain unreviewed by the agency or any court to this day and which could have been avoided by compliance with the statutory scheme devised by Congress.

III. THE FEDERAL CIRCUIT'S DECISION ADOPTING THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE GOVERNMENT'S POSITION IN TWO OTHER CASES ACCEPTED BY THIS COURT

The Federal Circuit's decision is also at odds with the position that the Government has taken in two previous cases accepted by this Court, *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), and *United States v. The Mead Corporation*, 185 F.3d 1304 (1999), *cert. granted*, 530 U.S. 1202 (2000). In each of those cases, the Government has sought a deferential standard of review for its decisions. In the first case, it sought deference for its duly promulgated regulations, and in the second instance it seeks deference for an administrative ruling. In *Haggar*, this Court ruled that deference should be accorded the agency for *duly promulgated* regulations. *Haggar*, 526 U.S. at 390. *Mead* is awaiting a decision by this Court.

In the instant case, the Government has obtained the court's approval that its decisions are of no consequence and as a result has escaped any accountability for its interpretive decisions. Thus, this case also presents the question of the weight to be accorded an interpretive ruling. The Government cannot "have it both ways." It should not be allowed to escape responsibility for its decisions in order to avoid legislatively mandated public scrutiny by required notice and comment while simultaneously demanding that

substantial judicial deference be accorded the very same type of decision. By seeking deference for its rulings from the courts while simultaneously seeking to avoid accountability for its interpretive rulings to escape the transparency and concomitant scrutiny envisioned by Congress under § 1625(c), the Government would have this Court eviscerate the procedural safeguards designed to protect against the type of arbitrary actions at issue in these cases. Petitioner was denied not only administrative consideration of the propriety of its duty assessment but also judicial consideration as the reviewing courts concluded that the notice and comment requirements were not triggered but failed to consider whether the duty assessments were proper. Clearly, this was not what was intended by Congress.

In *Haggar*, this Court considered the question of whether force of law Customs regulations are entitled to judicial deference in a refund suit brought in the Court of International Trade. *Haggar*, 526 U.S. at 383. Disagreeing with the Court of International Trade and the Federal Circuit, this Court held that the regulation in question was subject to the analysis required in *Chevron*. Specifically, this Court summarized the analysis to be undertaken as follows:

> Under *Chevron*, if a court determines that "Congress has directly spoken to the precise question at issue," then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If, however, the agency's statutory interpretation "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give [that] judgment 'controlling weight.'"

Haggar, 526 U.S. at 392 (citation omitted).

This Court concluded that regulations promulgated pursuant to a notice and comment process were entitled to judicial deference.

Subsequently, this Court granted certiorari to a petition filed by the Solicitor General in *Mead*, to review the question of whether the courts must accord *Chevron* controlling-weight deference to ordinary Customs classification rulings. 530 U.S. 1202 (2000).

In this case for which petitioner seeks review, the Government attempts to escape any responsibility for the same types of decisions as involved in *Mead*. In both cases, Customs issued protest review decisions. However, in *Mead* the Government seeks deference for Customs' decisions and here the Government claims that Customs' decision should be ignored. Its position is a blatant attempt to escape the mandatory public scrutiny required by 19 U.S.C. § 1625(c) by claiming it does not make "decisions." The Court of International Trade erroneously concluded that Customs did not make decisions that would trigger section 1625(c) and the Federal Circuit improperly avoided the question entirely. As a result, the Federal Circuit has allowed the Customs Service to avoid its statutory responsibility by failing to address the question of whether Customs made "decisions" with regard to the duty assessments for the vessel repair entries in question and erroneously overextending the *Texaco* decision by holding that the case wiped the "slate clean" and thereby short-circuiting an entire body of law. These flaws in the Federal Circuit's decision have enabled the Government to take a position that is at odds with the position that it now takes before this Court in *Mead*. Petitioners submitting that the Government's position here is designed to circumvent the statutory requirements of section 1625(c) and to escape the Congressionally mandated scrutiny acknowledged by the Court of International Trade in *American Bayridge*. 35 F. Supp.2d at 936. This is impermissible and constitutes additional grounds for this Court's review.

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 9, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

00-1047

SEA-LAND SERVICE, INC.,
(now known as SL Service Inc.)
Plaintiff-Appellant,

and

AMERICAN PRESIDENT LINES, LTD.
(now known as American Ship Management, LLC),
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Evelyn M. Suarez, Sonnenschein, Nath & Rosenthal, of Washington, DC, argued for plaintiff-appellant. With her on the brief was *Myles J. Ambrose*, Arter & Hadden LLP, of Washington, DC. Also on the brief for American Ship Management, LLC, was *Charles Routh*, Garvey, Schubert & Barer, of Seattle, Washington. Of counsel was *Marc Richard Baluda*, Arter & Hadden, LLP, of Washington, DC.

Barbara S. Williams, Attorney, Commercial Litigation Branch, Civil Division, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With her on the brief were *David M. Cohen*, Director, Commercial Litigation Branch, of Washington, DC; and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, of New York, New York. Of counsel on the brief is *Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of New York, New York.

Lauren R. Howard, Collier, Shannon, Rill & Scott, PLLC, of Washington, DC, argued for amicus curiae Shipbuilders Council of America, Inc.

Appealed from: U.S. Court of International Trade

Senior Judge Nicholas Tsoucalas

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

00-1047

SEA-LAND SERVICE, INC.,
(now known as SL Service Inc.),
Plaintiff-Appellant,

and

AMERICAN PRESIDENT LINES, LTD.,
(now known as American Ship Management, LLC),
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: February 16, 2001

Before SCHALL, BRYSON, and LINN, *Circuit Judges*.

SCHALL, *Circuit Judge*.

Under 19 U.S.C. § 1466(a),[1] a duty is imposed on the expenses of repairs on United States vessels in foreign shipyards. In *Texaco Marine Services, Inc. v. United States*, 44 F.3d 1539, 1543-44 (Fed. Cir. 1994), we held that dutiable expenses under § 1466(a) include all expenses that would not have been incurred "but for" the vessel's repairs. In this case, Sea-Land Service, Inc. and American President Lines, LTD, now known as American Ship Management, LLC (referred to collectively as "Sea-Land"), incurred repair expenses on

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[1] All statutory references are to the 1994 version of the United States Code, as modified by Supplement IV of 1998.

United States vessels in foreign shipyards with respect to which the United States Customs Service ("Customs") assessed duties pursuant to § 1466(a), following the "but for" test articulated in *Texaco*. Sea-Land protested the assessments. Following Customs' denial of the protests, Sea-Land appealed to the United States Court of International Trade. In its appeal, Sea-Land argued that the assessments were unlawful because, in denying its protests, Customs had violated 19 U.S.C. § 1625(c) by failing to publish the denials in the Customs Bulletin and Decisions ("Customs Bulletin") and by failing to provide for notice and comment with respect to the rulings on the assessments. Sea-Land argued that such actions were required because the denials of its protests amounted to interpretative rulings or decisions by Customs that modified, revoked, or had the effect of modifying or revoking earlier rulings or decisions that predated *Texaco*, thus bringing into play the notice and comment requirements of § 1625(c). In due course, Sea-Land and the United States moved for summary judgment. The court denied Sea-Land's motion, but granted that of the United States, concluding that Customs' actions in the case did not trigger the notice and comment requirements of § 1625(c). *Sea-Land Serv., Inc. v. United States*, 69 F. Supp. 2d 1371 (Ct. Int'l Trade 1999). We affirm.

BACKGROUND

I.

Section 1466(a) provides, in relevant part:

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad

> valorem duty of 50 per centum on the cost thereof in such foreign country. . . . For the purposes of this section, compensation paid to members of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs.

Under the statute, a fifty percent duty is imposed "on the value of 'expenses of repairs' made in a foreign country upon United States-flagged vessels." *Texaco*, 44 F.3d at 1540. Section 1466(a) provides that if the expenses incurred in a foreign port are not the "expenses of repairs" described in the statute, then the expenses are not subject to the fifty percent duty. *Id.* at 1540-41.

In *Texaco*, we were asked to review a Court of International Trade decision affirming Customs' determination that certain cleaning and equipment protective covering expenses incurred by a United States vessel in a foreign port were "expenses of repairs" under § 1466(a) and thus dutiable. *Id.* at 1540. The specific expenses at issue were expenses associated with clean-up following boiler room, cargo tank, and "after peak" tank repairs and expenses associated with protective coverings used during cargo tank repairs. *Id.* at 1541-52. In reviewing the Court of International Trade's decision, we first interpreted "expenses of repairs" under § 1466(a) to mean those repair expenses that would not have been incurred "but for" the repair work. *Id.* at 1544-45. In coming to this conclusion, we rejected earlier, more restrictive definitions of "expenses of repairs" by the Court of International Trade and the United States Customs Court. *Id.* at 1546-47. We then applied the "but for" approach under § 1466(a) to the expenses at issue and found that both the clean-up expenses, *id.* at 1548-50, and the expenses associated with the protective coverings, *id.* at 1550, were

expenses that would not have been incurred "but for" the vessel repairs. Therefore, we agreed with the Court of International Trade that Customs properly determined that those vessel repair expenses were dutiable under § 1466(a).

II.

We issued our *Texaco* decision on December 29, 1994. Shortly thereafter, on January 18, 1995, the Assistant Commissioner for Customs Office of Regulations and Rulings ("Assistant Commissioner") issued Headquarters ("HQ") memorandum 113308 to Customs' New Orleans Regional Director. The HQ memorandum was later published in the Customs Bulletin. HQ memorandum 113308 stated that the "but for" test for dutiable expenses of repair under § 1466(a) described in *Texaco* had "wide-ranging ramifications with respect to Customs' liquidation of vessel repair entries." In the memorandum, it was noted that certain expenses that Customs currently did not consider "expenses of repairs" under 19 U.S.C. § 1466(a), such as travel or transportation, would, under certain circumstances, "undoubtedly constitute dutiable 'expenses of repairs' under the 'but for' test" set forth in *Texaco*. The HQ memorandum stated that all costs not finally liquidated as of the date of *Texaco* "should be liquidated as dutiable as 'expenses of repairs' *provided* they pass the 'but for' test discussed above."

Sea-Land declared and entered vessel repair expenses with Customs from January 1995 through March 1996. The expenses involved work performed on several United States-flagged vessels by foreign labor. The expenses listed in the entries included expenses associated with transportation, travel, equipment rental, meals, administrative insurance, and tax costs.

Representatives of Sea-Land met with Customs officials on February 22, 1995, to discuss the ramifications of the *Texaco* decision, HQ memorandum 113308, and their belief that Customs needed to comply with the notice and comment

requirements of 19 U.S.C. § 1625(c) with respect to any rulings concerning the 1995-1996 repair expenses. On March 3, 1995, the Assistant Commissioner issued HQ memorandum 113350, which was subsequently published, modifying HQ memorandum 113308.[2] The new HQ memorandum provided that, instead of applying the "but for" test described in *Texaco* to all vessel repair expenses unliquidated at the time of the *Texaco* decision, Customs would only apply the test prospectively to entries filed after the date of the decision. The only exception to this rule was that the "but for" test would apply to unliquidated vessel repair expenses of the kind that were specifically at issue in *Texaco*, cleaning and protective covering expenses.

Customs then proceeded to examine each of Sea-Land's vessel repair expense entries, finding that some, but not all, of the entered expenses satisfied the "but for" test and were thus dutiable under § 1466(a). Sea-Land paid the liquidated duties on the applicable vessel repair entries and then filed administrative protests with Customs concerning the liquidations. After Customs' denial of the protests and further requests for review, Sea-Land appealed to the Court of International Trade seeking to recover the duties assessed by Customs under § 1466(a).

III.

Before the Court of International Trade, the parties stipulated to the pertinent facts. First, they agreed that, prior to *Texaco*, Customs had issued certain HQ rulings regarding the assessment of duties under § 1466(a) that had not been revoked, rescinded, or amended. *Sea-Land*, 69 F. Supp. 2d at 1375. The parties also agreed that these earlier HQ rulings involved duties on one or more of the expenses that were the subject of Sea-Land's protests. *Id.* In addition, the parties agreed that none of the duties under protest involved cleaning

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[2] Customs also published the full text of the *Texaco* decision.

or protective covering expenses similar to those disputed in *Texaco*. *Id.* Finally, Sea-Land and the government stipulated that "some of the protests relate to duty assessed to certain items on a pro rata basis apportioned by Customs to reflect what Customs alleges are dutiable and nondutiable foreign costs of an entry." *Id.*

With the above stipulation forming a backdrop, the parties cross-moved for summary judgment. In that setting, Sea-Land made three basic arguments. First, it argued that Customs had not actually applied the "but for" analysis to each of the expenses at issue. *Id.* at 1376. The Court of International Trade rejected this argument, concluding that Customs had conducted "a case-by-case 'but for' analysis for each expense at issue." *Id.* The court cited HQ memorandum 113308's instruction to evaluate each vessel repair entry under the "but for" standard as support for its conclusion. *Id.*

Sea-Land also argued that *Texaco* required that Customs determine whether assessing duties on a particular vessel repair expense runs counter to an established and uniform practice ("EUP")[3] of non-dutiability with respect to that expense. *Id.* at 1377. Sea-Land asserted that Customs' decision on its expenses changed various EUP's and that, consequently, Customs was required to comply with the notice requirement of 19 U.S.C. § 1315(d)[4] before any duties

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[3] The term "EUP" is used to describe a classification and liquidation of a particular good by Customs that is both established and uniform. In previous cases, this court has looked for "evidence of uniform classification and liquidation of merchandise at various ports over an extended period of time" to establish an EUP. *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575, 1581 (Fed. Cir. 1986).

[4] Section 1315(d) prohibits an "administrative ruling that results in the imposition of a higher rate of duty or charge than . . . [has] been applicable to imported merchandise under an established and uniform practice" from being effective until 30 days after publication of the ruling in the Federal Register. 19 U.S.C. § 1315(d); *see also Hemscheidt Corp. v. United States*, 72 F.3d 868, 870 (Fed. Cir. 1995) (noting that § 1315(d) "on its

could be assessed. *Id.* at 1377-78. Addressing this contention, the Court of International Trade reasoned that the notice requirement of 19 U.S.C. § 1315(d) did not apply because it was this court's holding in *Texaco*, not an "administrative ruling" as required by § 1315(d), that impacted the assessment of duties on Sea-Land's vessel repair expenses. *Id.* at 1379-80. The court therefore rejected Sea-Land's second argument.

Finally, Sea-Land argued that Customs had violated 19 U.S.C. § 1625(c) by issuing protest review decisions that modified or revoked prior Customs "interpretative rulings or decisions" without providing the required notice and comment period described in § 1625(c). *Id.* at 1380. The Court of International Trade concluded, however, that this court's decision in *Texaco*, not a Customs ruling, had established the statutory interpretation that modified or revoked previous Customs decisions, and that the notice and comment requirements of § 1625(c) thus did not apply. *Id.* at 1381. The court also concluded that a notice and comment period under § 1625(c) would serve no purpose because Customs was bound by this court's decision in *Texaco*. *Id.* at 1381-82. Consequently, it had no discretion or ability to modify the decision; it therefore would be unable to respond to any comments it received. *Id.* Having rejected all of Sea-Land's arguments, the court granted summary judgment in favor of the government.

Sea-Land appeals the Court of International Trade's decision. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a)(5).

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face bars the levy and collection of increases in duties when an established and uniform practice exists taxing the particular imported goods at a lower rate, unless the higher rate has been fixed by an administrative ruling, notice of which has been given").

DISCUSSION

I.

Summary judgment is proper by the United States Court of International Trade when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ct. Int'l Trade R. 56(d). We review a grant of summary judgment by the Court of International Trade "for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist."[5] *Guess?, Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991). On appeal, Sea-Land does not challenge Customs' application of the "but for" test under § 1466(a) to its vessel repair expense entries or the Court of International Trade's ruling on 19 U.S.C. § 1315(d). Rather, it contends that Customs was required to comply with the notice and comment requirements of 19 U.S.C. § 1625(c) when it determined that the vessel repair expenses at issue were dutiable under 19 U.S.C. § 1466(a).

As it did in the Court of International Trade, Sea-Land argues that Customs' determination that certain vessel repair expenses were dutiable expenses under § 1466(a) and its denial of Sea-Land's protests were "interpretative ruling[s] or decision[s]" under § 1625(c). Sea-Land contends that these interpretative rulings or decisions by Customs modified, revoked, or had the effect of modifying earlier rulings or decisions by Customs that the vessel repair expenses at issue were not dutiable under § 1466(a). Sea-Land argues that since Customs' assessment of duties against it involved interpretative rulings or decisions that modified or revoked earlier Customs rulings or decisions, Customs was required by § 1625(c) to provide notice and comment before liquidating Sea-Land's vessel repair expense entries. Sea-

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[5] As noted above, Sea-Land and the government stipulated to the pertinent facts for purposes of their summary judgment motions.

Land argues that *Texaco* did not revoke Customs' prior rulings or decisions regarding the dutiability of specific vessel repair expenses at issue because it did not address whether the expenses at issue in this case were dutiable. Sea-Land acknowledges that *Texaco* established the "but for" test for determining which expenses are dutiable under § 1466(a), but asserts that the *Texaco* court only decided, under the "but for" test, that cleaning and protective covering expenses were dutiable.

The government responds that § 1625(c) does not apply to Customs' actions in this case because Customs did not issue any "interpretative ruling[s] or decision[s]." The government also argues that this court in *Texaco*, not Customs, modified or revoked any existing rulings or decisions involving the particular expenses at issue because this court in *Texaco*, not Customs, established the "but for" test under § 1466(a). The government also argues that any change in Customs' treatment of particular vessel repair expenses was a change mandated by *Texaco* that Customs properly followed in this case by applying the "but for" test to Sea-Land's vessel repair expense entries.

For the reasons that follow, we reject Sea-Land's arguments and conclude that Customs' actions in this case did not trigger the notice and comment requirements of 19 U.S.C. § 1625(c).

II.

Entitled "Modification and revocation," 19 U.S.C § 1625(c) states that:

> A proposed interpretive ruling or decision which would—
>
> > (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
>
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

Section 1625(c) mandates that Customs provide notice and comment under specific circumstances. First, § 1625(c) only applies to a "proposed interpretive ruling or decision" by Customs. *Id.* Second, the proposed interpretive ruling or decision must either modify or revoke a prior ruling or decision or have the effect of modifying Customs' previous treatment of "substantially identical transactions." *Id.* Section 1625(c) requires that, before Customs issues such an interpretative ruling or decision, it publish it and allow interested parties an opportunity to comment on its correctness. *Id.* The statute instructs Customs to consider the comments it receives. *Id.* Section 1625(c) then provides that the final ruling or decision will become effective 60 days after its publication. *Id.*

III.

For purposes of this appeal, we will assume, without deciding, that the first requirement of § 1625(c) is met—that Customs' actions with respect to Sea-Land's vessel repair expense entries are "interpretative ruling[s] or decision[s]" under § 1625(c). Sea-Land's argument fails, however, because the second requirement of § 1625(c) is not met. The reason is that Customs' "interpretative ruling[s] or

decision[s]" in this case did not modify, revoke, or have the effect of modifying earlier Customs interpretative rulings, decisions, or treatment of substantially identical vessel repair expenses under § 1466(a). Before Customs' actions in this case, this court's decision in *Texaco* in late 1994 had the effect of modifying all of Customs previous rulings, decisions, and treatment of vessel repair expenses under § 1466(a). Since Customs' actions do not meet the second condition under § 1625(c), the notice and comment requirements described in § 1625(c) were not triggered.

It was this court in *Texaco* that modified the treatment of vessel repair expenses under § 1466(a). We "clarif[ied]" the judicial interpretation of 19 U.S.C. § 1466(a) in *Texaco*, explaining that, based on the plain language of the statute, "expenses of repairs" in § 1466(a) meant those expenses that would not have been incurred "but for" the ship's repair. *Texaco*, 44 F.3d at 1546. With this explicit interpretation of § 1466(a), *Texaco* wiped the slate of decisions under § 1466(a) clean, requiring the dutiability of *all* vessel repair expenses to be determined by the "but for" test. Customs is required to follow and apply the "but for" test. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (noting that "[t]he judiciary is the final authority on issues of statutory construction" and that when a "court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect"). Any decision by Customs after *Texaco* is a decision under the new, clarified standards for determining what expenses under § 1466(a) are dutiable. Since this court, through its decision in *Texaco*, changed Customs' earlier treatment of vessel repair expenses under § 1466(a), Customs' actions after *Texaco* cannot be recognized as rulings or decisions that revoke or modify Customs' earlier decisions under § 1466(a). Furthermore, Customs, required

to act under this court's interpretation of § 1466(a), cannot be said to be the one changing any of its previous decisions; our decision in *Texaco* created those changes.

Sea-Land is correct that *Texaco* did not apply the "but for" test to the particular expenses at issue in this case. As noted above, *Texaco* only dealt with the application of the "but for" test to two types of vessel repair expenses—cleaning and protective covering costs. *Texaco*, 44 F.3d 1548-50. However, when Customs deviates from its prior practice when evaluating a vessel repair expense after *Texaco* to determine whether that expense meets the "but for" test, Customs is following the new rules established by this court. Again, any change in Customs' treatment of a particular expense is the doing of our decision in *Texaco*, not a decision by Customs. In effect, in making the decisions it made regarding Sea-Land's expenses after *Texaco*, Customs was deciding vessel repair expense issues for the first time under the "new" interpretation of § 1466(a) set forth in *Texaco*. Thus, Customs' decisions cannot be considered to be modifications of Customs' earlier treatment of those expenses, because, in essence, there was no previous treatment under the "new" interpretation of § 1466(a).

Our holding that our decision in *Texaco*, and not Customs' decisions regarding each of Sea-Land's expenses, modified Customs' earlier treatment of all vessel repair expenses under § 1466(a) is supported by the policy and purpose behind § 1625(c). The legislative history of § 1625(c) indicates that the statute's purpose is to provide "assurances of transparency concerning Customs rulings and policy directives through publication" of Customs' rulings or decisions that modify or revoke an existing ruling or decision. H.R. Rep. No. 103-361, at 124 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2551, 2674. Section 1625(c)'s notice and comment requirements are intended to ensure that the interested public has notice of a proposed change in Customs' policy and to allow the public

to make comments on the appropriateness of the change and to modify any current practices that were based in reliance on Customs' earlier policy. Section 1625(c) also provides for Customs to make an informed decision when changing its policies through the comments it receives.

Since it was our decision in *Texaco*, not Customs' later actions in this case, that changed Customs' policy towards dutiability of vessel repair expenses under § 1466(a), the policy reasons for notice and comment embedded in § 1625(c) do not apply. The interested public was given notice of the modification in the way vessel repair expenses would be determined to be dutiable under § 1466(a) by way of the publication of this court's decision in *Texaco*. Furthermore, although Customs' individual evaluation on certain expenses may represent the first time that specific expenses are handled differently, the new approach was not brought on by the will of Customs, but by the decision in *Texaco*, a decision of which the public was notified. Additionally, comments from the interested public on Customs' actions under these circumstances are not helpful because Customs is merely implementing this court's interpretation of § 1466(a), an interpretation that, as noted above, Customs is required to follow. Notably, 19 U.S.C. § 1625(d) calls for notice and comment when Customs "proposes to limit the application of a court decision," something which Customs is not doing in this case with regards to *Texaco*, as can be seen in HQ memorandum 113308. Put simply, since Customs' change in the way it approached vessel repair expenses under § 1466(a) was mandated by our decision in *Texaco*, not a self-proposed change by Customs, requiring notice and comment in this case would not serve the purpose and policy behind § 1625(c).

CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade is

AFFIRMED.

Each party shall bear its own costs.

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

Consol. Court No. 96-02-00398
Slip Op. 99-100

SEA-LAND SERVICE, INC.;
AMERICAN PRESIDENT LINES, LTD.,
Plaintiffs,

v.

UNITED STATES,
Defendant.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

Plaintiffs, Sea-Land Service, Inc. ("Sea-Land") and American President Lines, Ltd. ("APL"), move, pursuant to USCIT R. 56, for summary judgment on the grounds that the undisputed facts show that, as a matter of law, the United States Customs Service ("Customs") misapplied the decision of *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539 (Fed Cir. 1994), in assessing duties under 19 U.S.C. § 1466(a) (1994) on plaintiffs' entries of repairs completed on their United States-flagged vessels while abroad. Specifically, plaintiffs claim that Customs: (1) erred in finding that plaintiffs were *per se* liable for duties on vessel repair expenses under 19 U.S.C. § 1466(a) without performing *Texaco*'s mandated case-by-case analysis of each expense to determine if such expense would not have been incurred "but for" the dutiable repair work; (2) improperly applied *dicta* in *Texaco* concerning certain vessel repair expenses to similar expenses at issue in this case; (3) failed to properly apply an alleged second prong of *Texaco*'s "but for" test by not providing notice in the Federal Register as required under

19 U.S.C. § 1315(d) (1994) when Customs issued rulings changing various established and uniform practices ("EUPs") that previously treated certain vessel repair expenses at issue in this case as nondutiable; and (4) violated 19 U.S.C. § 1625(c) (1994) by issuing protest review decisions modifying or revoking prior Customs interpretive rulings or decisions without giving interested parties notice and opportunity to comment as required under the statute. Plaintiffs also argue that Customs inappropriately applied a *pro rata* duty assessment formula to certain vessel repair expenses that is inconsistent with *Texaco* and 19 U.S.C. § 1466(a). However, since such expenses were not raised in this case, they request that the proration issue be dismissed or severed from this action to allow them to litigate the matter in related actions which more accurately raise the issue. Plaintiffs also request that the Court hold the vessel repair entries as nondutiable and order Customs to reliquidate the protested entries and refund all excess duties plus interest as provided by law.

Defendant opposes plaintiffs' motion and cross-moves, pursuant to USCIT R. 56, for summary judgment, claiming that the entries were properly liquidated as dutiable pursuant to 19 U.S.C. § 1466(a). In particular, defendant asserts that: (1) Customs conducted a case-by-case, rather than *per se*, "but for" analysis for each vessel repair expense at issue; (2) Customs properly applied the "but for" test, rather than *dicta*, as enunciated by *Texaco* to such expenses; (3) *Texaco* did not establish a second prong test requiring Customs to find that no EUPs exist under 19 U.S.C. § 1315(d) before it can impose duties on vessel repair-related expenses; (4) the provisions of 19 U.S.C. § 1625(c) are inapplicable in this case; and (5) this Court lacks jurisdiction to address plaintiffs' proration matter and, therefore, summary judgment is improper on this issue.

Held: Plaintiffs' motion for summary judgment is denied and defendant's cross-motion is granted. This action is dismissed.

[Plaintiffs' summary judgment motion denied; defendant's cross-motion granted. Case dismissed.]

Dated: September 23, 1999

Arter & Hadden LLP (*Myles J. Ambrose* and *Evelyn M. Suarez*); of counsel: *Robert S. Zuckerman*, for plaintiff Sea-Land Service, Inc.

Garvey, Schubert & Barer (*E. Charles Routh* and *Carol L. Saboda*) for plaintiff American President Lines, Ltd.

David W. Odgen, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Barbara S. Williams*); of counsel: *Karen P. Binder*, Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

Collier, Shannon, Rill & Scott, PLLC (*Lauren R. Howard*) for Shipbuilders Council of America, Inc., *amicus curiae* in support of defendant's cross-motion for summary judgment.

OPINION

TSOUCALAS, Senior Judge: This matter is before the Court on cross-motions for summary judgment pursuant to USCIT R. 56. In their motion for summary judgment, plaintiffs, Sea-Land Service, Inc. ("Sea-Land") and American President Lines, Ltd. ("APL"), seek to recover duties assessed by the United States Customs Service ("Customs") under 19 U.S.C. § 1466(a) (1994) on plaintiffs' entries of repairs completed on their United States flagged-vessels while abroad. Plaintiffs request that the Court hold the vessel repair entries as nondutiable and order Customs to reliquidate the protested entries and refund all excess duties plus interest as

provided by law. Defendant counters that the entries were properly liquidated as dutiable pursuant to 19 U.S.C. § 1466(a). For the reasons set forth in the opinion which follows, the Court grants defendant's cross-motion for summary judgment and denies plaintiffs' motion. The action is dismissed.

BACKGROUND

I. *Texaco*'s "But For" Test

This case involves Customs' application of *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539 (Fed. Cir. 1994). In *Texaco*, the United States Court of Appeals for the Federal Circuit ("CAFC") affirmed this Court's holding that post-repair cleaning and protective covering expenses related to repairs performed on a United States-flagged vessel by foreign labor while abroad, were properly dutiable as "expenses of repairs" pursuant to the vessel repair statute, 19 U.S.C. § 1466(a),[1] because the expenses were an integral part of the repair process and would not have been necessary "but for" the dutiable repairs. *See Texaco*, 44 F.3d at 1543-50.

The CAFC in *Texaco* also provided clear guidance for interpreting the phrase "expenses of repairs" in 19 U.S.C. § 1466(a). *See id.* at 1543-45. The CAFC found that "the language 'expenses of repairs' is broad and unqualified." *Id.* at 1544. In particular, the CAFC interpreted "'expenses of

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[1] Title 19, United States Code, § 1466(a) provides in pertinent part:

(a) Vessels subject to duty; penalties

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (1994).

repairs' as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, 'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work." *Id.* To interpret the statute any more restrictively would, according to the CAFC, thwart Congress' intent to make the statute's application broad in scope. *See id.* Indeed, the CAFC noted that such a "but for" interpretation effectuates the statute's clear purpose of protecting United States shipbuilding and repair industry. *See id.* at 1544-45.

The CAFC further found that to the extent that non-binding judicial authority relied upon by plaintiffs in *Texaco* was inconsistent with the court's "but for" interpretation, it was "not persuaded . . . to interpret 'expenses of repairs' any more restrictively than the plain language of the statute warrants." *Id.* at 1546. Specifically, the CAFC addressed three cases: (1) *American Viking Corp. v. United States*, 37 Cust. Ct. 237, 245, C.D. 1830, 150 F. Supp. 746, 752 (1956) (holding that expense of providing lighting needed to perform a dutiable repair was not dutiable as an expense of the repair); (2) *International Navigation Co. v. United States*, 38 Cust. Ct. 5, 12, C.D. 1836, 148 F. Supp. 448, 455 (1957) (holding that expenses to transport a foreign repair crew to and from an anchored vessel being repaired, which expenses the court specifically found were necessary to perform the work, were not dutiable as expenses of repairs); and (3) *Mount Washington Tanker Co. v. United States*, 1 CIT 32, 42, 505 F. Supp. 209, 216 (1980) (holding that expenses for compensating foreign repair crew members for their time spent traveling between their home country and a vessel anchored at sea off another foreign port were not dutiable as an expense of the dutiable repairs performed by the repair crew). *See id.* at 1546-47. The CAFC determined that the vessel repair-related expenses at issue in these three cases would also have been viewed as coming within 19 U.S.C.

§ 1466(a) if a "but for" approach was applied. *See id.* The CAFC, therefore, concluded that these cases were "incorrectly decided." *Id.* at 1547.

Finally, the CAFC rejected plaintiffs' claim in *Texaco* that Customs' assessment of duties on the cleaning and protective covering expenses was improper because it was based on an interpretation of "expenses of repairs" that was a change in established and uniform practice ("EUP"), as provided by a Treasury decision, and that Customs made the change without giving notice in the Federal Register as required under 19 U.S.C. § 1315(d) (1994). *See id.* at 1547-48. In particular, plaintiffs asserted that Treasury Decision ("T.D.") 39443, 43 Treas. Dec. 99 (1923), established an interpretation for "expenses of repairs" which was inconsistent with Customs' assessment of duties in the *Texaco* case. *See Texaco*, 44 F.3d at 1547. Plaintiffs claimed that T.D. 39443 interpreted "expenses of repairs" under 19 U.S.C. § 1466(a) "as covering only those expenses incurred for work directly involved in the actual making of repairs" and that, therefore, under this standard, cleaning and protective covering expenses were "not 'expenses of repairs' within the meaning of the statute." *Id.* The CAFC disagreed that T.D. 39443 established a narrow standard for "expenses of repairs" and, in fact, the court concluded that it provided nothing with respect to the interpretation of "expenses of repairs." *See id.* at 1548.

After finding this Court properly adopted a "but for" standard for "expenses of repairs," the CAFC concluded that the expenses at issue in *Texaco* were properly assessed with the vessel repair duty under 19 U.S.C. § 1466(a).

II. Customs' Application of *Texaco*

A. HQ Memorandum 113308

Recognizing that the CAFC's decision in *Texaco* was not only dispositive for the expenses at issue in the case, but also

instructive as to Customs' administration of the vessel repair statute with respect to the interpretation of the term "expenses of repairs" contained therein, the Assistant Commissioner for Customs Office of Regulations and Rulings ("OR&R") issued Headquarters ("HQ") memorandum 113308 to Customs Regional Director, Commercial Operations Division, New Orleans, dated January 18, 1995, and subsequently published it in the *Customs Bulletin and Decisions*. *See* 29 *Cust. B. & Dec.* 59 (Feb. 8, 1995). In that memorandum, copies of which were disseminated to two other field offices charged with the liquidation of vessel repair entries, Customs stated that pursuant to *Texaco*, foreign repair expenses previously considered nondutiable would possibly "constitute dutiable 'expenses of repairs' under the 'but for' test." *Id.* at 60. The memorandum instructed that any foreign repair costs contained in the vessel repair entries not finally liquidated as of the date of the CAFC's *Texaco* decision (that is, Dec. 29, 1994), should be liquidated as dutiable "expenses of repairs" provided they pass *Texaco's* "but for" test. *See id.*

B. HQ Memorandum 113350

In response to the HQ memorandum 113308, plaintiffs and other American vessel owners/operators requested a meeting with Customs to discuss Customs' implementation of *Texaco*'s "but for" test. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at Ex. 3. On February 22, 1995, representatives of Sea-Land and APL met with the Assistant Commissioner of OR&R and other Customs staff and urged Customs to rescind HQ memorandum 113308, but Customs refused to retract it. *See id.*

Nevertheless, upon further review of the matter, the Assistant Commissioner of OR&R again issued a HQ memorandum, denominated 113350, to the Regional Director, Commercial Operations Division, New Orleans, dated March 3, 1995, and subsequently published in the *Customs Bulletin and Decisions*, which clarified the effective

date of HQ memorandum 113308. *See* 29 *Cust. B. & Dec.* 24 (Apr. 5, 1995).[2] The HQ memorandum 113350 provided that instead of assessing duties on vessel repair entries unliquidated at the time of CAFC's *Texaco* decision, Customs would limit its assessment to entries filed on or after the date of that decision. *See id.* at 25. With respect to the vessel repair entries filed prior to the *Texaco* decision, Customs would retroactively apply *Texaco's* "but for" test only to the post-repair cleaning and protective covering expenses that were directly decided by the CAFC in that case. *See id.*

C. Assessment of Duties

From January 1995 through March 1996, Sea-Land and APL declared and entered with Customs the vessel repair expenses that are at issue here as required under 19 C.F.R. § 4.14(b) (1995 & 1996).[3] The vessel repair entries involved expenses for work performed abroad on several United States-flagged vessels by foreign labor. The entries included expenses such as transportation, travel, equipment rental, meal, administrative, insurance and tax costs. None of the entries concerned dry-docking expenses. Customs examined every entry to determine whether each expense was incurred "but for" dutiable repairs. For those expenses which Customs found satisfied the "but for" test, Customs liquidated the entries and assessed duties pursuant to 19 U.S.C. § 1466(a); where Customs found that the expenses did not pass the "but for" test, no duties were imposed.

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[2] Customs also published the text of the *Texaco* decision in the *Customs Bulletin and Decisions*. *See* 29 *Cust. B. & Dec.* 19 (Mar. 8, 1995).

[3] A vessel owner (or master) is required, upon first arrival of the vessel in the United States, to declare to Customs all repairs made outside of the United States, regardless of the dutiable status of the expenses for repairs. *See* 19 C.F.R. § 4.14(b)(1) (1995 & 1996). The vessel owner (or master) also must file entry of repairs with Customs. *See id.* § 4.14(b)(2).

III. Procedural History

After all the liquidated duties on the applicable vessel repair entries were paid as required by 28 U.S.C. § 2637(a) (1994), Sea-Land and APL filed administrative protests for the liquidations. In due course, Customs denied the protests, whereupon Sea-Land and APL subsequently filed separate actions before this Court. These actions were consolidated on May 20, 1997. The consolidated action was designated as a test case for all further entries pursuant to USCIT R. 84(c). On July 7, 1998, Sea-Land and APL jointly moved for summary judgment to recover any and all excess duties together with interest assessed by Customs on the protested vessel repair entries under 19 U.S.C. § 1466(a). Defendant cross-moved for summary judgment on December 7, 1998, maintaining that Customs properly assessed such duties. On December 17, 1998, this Court allowed Shipbuilders Council of America, Inc., a national nonprofit trade association representing United States shipyards engaged in the construction and repair of ocean-going vessels, to participate as *amicus curiae* in support of the defendant's position. Oral argument was heard on June 29, 1999.

DISCUSSION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1994).

I. Standard of Review

"On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. The court may not resolve or try factual issues on a motion for summary judgment." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988) (citations omitted). In ruling on cross-motions for summary judgment, if no genuine issue of material fact exists, the court must determine whether

either party "is entitled to a judgment as a matter of law." USCIT R. 56(d); *see Skaraborg Invest USA, Inc. v. United States*, 22 CIT __, __, 9 F. Supp. 2d 706, 708 (1998); *Phone-Mate*, 12 CIT at 577, 690 F. Supp. at 1050. This is the same standard set forth in Fed. R. Civ. P. 56(c). *See Texaco*, 44 F.3d at 1543.

In this case, the movants stipulated to the following facts: (1) Customs issued certain HQ rulings, as enumerated in the pleadings, that have not been revoked, rescinded, amended or noted as a change of practice or position pursuant to 19 U.S.C. § 1625(a) and 19 C.F.R. § 177.10(c); (2) such HQ rulings relate to the dutiability of one or more items of the plaintiffs' protests; (3) none of the protests relates to duty assessed under 19 U.S.C. § 1466(a) for cleaning or covering expenses; and (4) some of the protests relate to duty assessed to certain items on a *pro rata* basis apportioned by Customs to reflect what Customs alleges are the dutiable and nondutiable foreign costs of an entry. *See* Stip. Facts at ¶ 1-5 (Aug. 21, 1997). The movants agree, and the Court finds, that there are no genuine material issues of fact in dispute and this action may be decided on motion for summary judgment.

II. Customs' Alleged Per Se Application of *Texaco*'s "But For" Test

Plaintiffs argue that Customs violated the doctrine of stare *decisis* because, contrary to *Texaco*, it had taken the position that plaintiffs were *per se* liable for the 50-percent *ad valorem* duty on various vessel repair expenses under 19 U.S.C. § 1466(a) without performing a case-by-case "but for" analysis for each expense. *See* Pls.' Mem. Supp. Mot. Summ. J. at 7. Specifically, plaintiffs note that *Texaco* held that only post-repair cleaning and protective covering expenses are dutiable as "expenses of repairs" under 19 U.S.C. § 1466(a). *See id.* at 10. Since none of the protests in this case involved cleaning or covering expenses, *see* Stip. Facts at ¶ 4, plaintiffs

assert that *Texaco* requires Customs to apply a "two-prong" test on a case-by-case, rather than a *per se*, basis to determine whether a particular expense is dutiable as an expense of repair, *see* Pls.' Mem. Supp. Mot. Summ. J. at 10-15.

Defendant counters that Customs individually applied the "but for" test to each and every vessel repair-related expense at issue, rather than on a *per se* basis and correctly determined that each of plaintiffs' dutiable expenses were incurred "but for" dutiable vessel repairs. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 9-18.

The Court agrees with the defendant that Customs properly conducted a case-by-case "but for" analysis for each expense at issue. Customs' HQ memoranda 113308 and 113350 lend support to such a conclusion. Rather than directing its field offices to automatically assess the 50-percent *ad valorem* duty on every vessel repair entry, HQ memorandum 113308 instructed that "any . . . costs contained in vessel repair entries . . . should be liquidated as dutiable as 'expenses of repairs' *provided* they pass the 'but for' test." 29 Cust. B. & Dec. 59, 60 (Feb. 8, 1995) (emphasis in original). Likewise, HQ memorandum 113350 noted that "a myriad of foreign repair expenses previously accorded duty-free treatment would, under certain circumstances, no longer receive such treatment." 29 *Cust. B. & Dec.* 24 (Apr. 5, 1995). Indeed, a review of the entries in these consolidated actions establish that Customs not only instructed its field offices to perform a case-by-case "but for" analysis of each expense, but Customs also actually performed this analysis. Various entries show that Customs found some expenses were dutiable, while other expenses, even within the same entry, were determined to be nondutiable.

III. Customs' Alleged Application of *Texaco Dicta*

Plaintiffs assert that the CAFC's statements in *Texaco* concerning lighting, transportation and travel expenses were

dicta without any stare decisis effect because such expenses were not directly before the CAFC in that case. *See* Pls.' Mem. Supp. Mot. Summ. J. at 10-11. In particular, plaintiffs note that these expenses were mentioned in previous cases (that is, *American Viking* (lighting expenses), *International Navigation* (repair crew transportation expenses) and *Mount Washington* (travel time compensation expenses)) used by the CAFC to further demonstrate the validity of the "but for" test. *See id.* at 11. Plaintiffs note that Customs' position in this case that *Texaco* constitutes *stare decisis* for resolving expenses, which do not concern clean up or protective covering expenses directly involved in *Texaco*, is untenable because it goes beyond well-established rules which mandate applying the *stare decisis* doctrine only to those cases with similar fact patterns. *See id.* Plaintiffs, therefore, argue that Customs improperly acted by applying such *dicta* to similar expenses at issue in this case. *See id.*

Defendant argues that the CAFC's determination in *Texaco* finding that lighting, transportation and travel expenses are dutiable is *stare decisis*, rather than *dicta*, because the determination was essential to the court's finding that the phrase "expenses of repairs" under 19 U.S.C. § 1466(a) implicates the "but for" standard. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 17. In the alternative, defendant asserts that *Texaco*'s "but for" test is still binding precedent here and must be applied to all expenses to determine those that are dutiable. *See id.* at 17-18. In particular, defendant claims that the CAFC's analysis in *Texaco* of the vessel repair statute so as to require the application of the "but for" test to each expense was an issue of law and, therefore, is binding law in this case. *See id.*

The Court rejects plaintiffs' argument that Customs acted improperly by applying alleged *dicta* from *Texaco*. Even if the CAFC's determinations in *Texaco* on such expenses "might" technically qualify as *dicta* and, therefore, might not be binding in a subsequent proceeding such as this one, *see*

generally King v. Erickson, 89 F.3d 1575, 1582 (Fed. Cir. 1996) (defining *dicta* as "[w]ords of an opinion entirely unnecessary for the decision of the case") (citations omitted), *rev'd sub nom. on other grounds*, 522 U.S. 262 (1998), the Court nevertheless finds that Customs acted properly. Under principles of *stare decisis*, Customs was still bound to apply *Texaco*'s mandate of assessing the vessel repair duty on any and all repair expenses in this case meeting the "but for" test, including, but not limited to, lighting, transportation and travel expenses.

IV. *Texaco*'s Alleged Two-Prong Test

A. Applicability of 19 U.S.C. § 1315(d)

Plaintiffs maintain that *Texaco* established a "two-prong" test for determining dutiability of vessel repair expenses under 19 U.S.C. § 1466(a). *See* Pls.' Mem. Supp. Mot. Summ. J. at 10-15. Under the first prong, plaintiffs assert that Customs must determine whether a particular expense met the "but for" standard, that is, whether the expense would not have been necessary "but for" dutiable vessel repairs. *See id.* at 12. Even if the expense is found to be dutiable under this standard, plaintiffs contend that the second prong requires that Customs also find that assessing duties on the particular expense at issue does not run counter to an EUP of nondutiability of that expense. *See id.* at 14. If the expense is contrary to such an EUP, plaintiffs assert that Customs must first comply, under *Texaco*, with the notice requirement of 19 U.S.C. § 1315(d), and now the notice-and-comment requirements of 19 U.S.C. § 1625(c) (1994), before ruling that the expense is dutiable. *See id.* Plaintiffs assert that Customs failed: (1) to properly apply *Texaco*'s two-prong test; and (2) to comply with the statutory notice-and-comment requirements before assessing duties to expenses at issue in this case. *See id.* at 11-15.

With respect to the second prong, plaintiffs first suggest that Customs' protest review decisions, not the CAFC's *Texaco* decision, changed various EUPs that found certain vessel repair expenses at issue in this case as nondutiable. *See* Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 6-11. These protest review decisions, according to plaintiffs, triggered the notice requirement of § 1315(d),[4] which Customs neglected to comply with here. *See id.* Plaintiffs claim that the change in EUPs were acknowledged by Customs in HQ memorandum 113308 for it provided a "finding" of various EUPs by the Secretary of the Treasury under 19 U.S.C. § 1315(d).[5] *See id.* at 6-7. Even absent such a formal finding, plaintiffs claim that *de facto* EUPs existed because (1) hundreds of HQ rulings, which plaintiffs identified in their complaints as being revoked by Customs and to which Customs stipulated in issuing such rulings, clearly established a series of EUPs; and (2) the language of

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[4] Title 19, United States Code, § 1315(d) provides in pertinent part:

> (d) Effective date of administrative rulings resulting in higher rates
>
> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling.

19 U.S.C. § 1315(d) (1994).

[5] HQ memorandum 113308 stated impertinent part:

> It is readily apparent that this case has wide-ranging ramifications with respect to customs liquidation of vessel repair entries/ For example, as you well know we currently do not consider the following foreign costs dutiable under the vessel repair statute: air, crane, drydocking charges, electricity, travel/transportation, launch use, lodging, security and staging. . . . [T]his list of costs is not all inclusive.

29 *Cust. B. & Dec.* 59, 59-60 (Feb. 8, 1995).

HQ memoranda 113308 and 113350 clearly provided that Customs had EUPs of not considering the expenses at issue as dutiable. *See id.* at 3-10.

Plaintiffs further argue that even if this Court were to find that they had not carried their burden of proof of showing *de facto* EUPs at this stage of the proceedings, this does not mean that Customs is entitled to summary judgment; rather, they contend this simply raises an issue of proof which would have to be resolved at a trial. *See id.* at 9. Plaintiffs also maintain that the alleged protest review decisions applied the "but for" test to determine whether a particular expense was a dutiable expense of repair without taking the second step under *Texaco* of analyzing whether EUPs existed for the various expenses. *See id.* at 9-10.

Defendant argues that *Texaco* did not establish a second prong test requiring Customs to find that no EUP exists under 19 U.S.C. § 1315(d) before it can impose duties on vessel repair-related expenses. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 19. Moreover, defendant asserts that 19 U.S.C. § 1315(d)'s requisite notice in the Federal Register was not violated here. *See id.* at 18. Specifically, defendant claims that there was no "administrative ruling" resulting in the imposition of a higher rate of duty on "imported merchandise"[6] under an EUP because HQ memoranda 113308 and 113350, Customs' protest denials or any of plaintiffs' unnamed and unidentified protest review decisions did not result in the assessment of higher duties. *See* Def.'s Mem. Reply to Pls.' Opp'n to Def.'s Cross-mot. Summ. J. at 7-8. Rather, defendant contends that the CAFC's decision in *Texaco* mandated the change. *See id.* at 8.

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[6] With respect to "imported merchandise," the CAFC clarified that "19 U.S.C. § 1498(a)(10) . . . indicates an intention by Congress that expenses within the vessel repair statute shall be regarded as merchandise imported into the United States." *Texaco*, 44 F.3d at 1547 (citations omitted).

In the alternative, defendant argues that even if one assumes that an "administrative ruling" resulted in the assessment of higher duties on plaintiffs' entries, 19 U.S.C. § 1315(d) is still inapplicable because plaintiffs did not meet their burden of proving either (1) the Secretary of the Treasury made a formal "finding" of an EUP as required by the statute; or (2) if no finding was made by the Secretary, that a *de facto* EUP existed. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 22-28. Even if plaintiffs show that a *de facto* EUP existed, defendant claims that the plaintiffs had actual notice of the change in practice before the entries were made in this action because (1) plaintiffs were members of The American Institute for Merchant Shipping, who participated as *amicus curiae* in *Texaco*; (2) Customs had issued and published HQ memoranda 113308 and 113350; and (3) plaintiffs met with Customs on February 22, 1995. *See id.* at 28-32.

1. Texaco's One-Prong "But For" Test

The Court rejects plaintiffs argument that *Texaco* contained a second prong requiring Customs to affirmatively prove no EUP exists under 19 U.S.C. § 1315(d) before it can impose duties on vessel repair-related expenses found dutiable under the "but for" test.[7] Although plaintiffs note that in *Texaco* the CAFC stated "we hold that the imposition of the fifty percent *ad valorem* duty upon the expenses at issue in this case was consistent with the vessel repair statute and not contrary to any established and uniform practice of Customs," this Court finds that the CAFC's statement does not establish a two-prong test for determining the dutiability of a vessel repair expense under 19 U.S.C. § 1466(a). *Texaco*, 44 F.3d at 1543.

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[7] Plaintiffs do not challenge Customs' use of the "but for" test to determine whether a particular entry of repair is dutiable as an expense of repair under 19 U.S.C. § 1466(a). *See* Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 3.

In *Texaco*, the CAFC agreed with this Court's "but for" interpretation of "expenses of repairs" under 19 U.S.C. § 1466(a) that duties can be assessed against vessel repair expenses incurred "but for" dutiable repair work. *See id.* at 1543-45. Only after reaching this finding, the CAFC considered and rejected the plaintiffs' claim in *Texaco* that Customs should not have assessed duties on the expenses at issue in the case because Customs' assessment changed an EUP without providing the requisite notice in the Federal Register under 19 U.S.C. § 1315(d). *See id.* at 1547-48. In responding to plaintiffs' argument, the CAFC affirmed that an EUP claim is available to a party in a case involving the imposition of a higher rate of duty to imported merchandise, including duties on vessel repair expenses. *See id.*

Nevertheless, the CAFC in *Texaco* did not change the fact that the burden rests upon the plaintiff to prove that an EUP exists under 19 U.S.C. § 1315(d), a burden the CAFC determined the plaintiffs did not meet in the case.[8] *See, e.g., Siemens America, Inc. v. United States*, 692 F.2d 1382, 1384 (Fed. Cir. 1982) (noting that, even if a "finding" of an EUP by the Secretary of the Treasury is not a prerequisite to application of 19 U.S.C. § 1315(d), the importers still shoulder "their burden of proving that there existed an established and uniform practice"). In other words, the CAFC did not create a second prong requiring Customs to affirmatively prove that an EUP does not exist before it can impose duties on expenses that meet the "but for" test; rather, the CAFC merely addressed the plaintiffs' failure to satisfy their burden of demonstrating an EUP under 19 U.S.C. §1315(d). The Court, therefore, finds that *Texaco* only established a one-prong "but for" test for determining whether a vessel repair expense under 19 U.S.C. § 1466(a) is dutiable.

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[8] Indeed, plaintiffs appear to acknowledge this burden, asserting in their reply brief that they "met their burden to establish the existence of EUP's." Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 6.

2. Lack of "Administrative Ruling" Under 19 U.S.C. § 1315(d)

The Court further finds that the thirty-day notice in the Federal Register under 19 U.S.C. § 1315(d) is inapplicable in this case because plaintiffs failed to demonstrate that the elements of the statute were violated. To trigger this procedural requirement, there must have been (1) an administrative ruling that increases the rate of duty on the imported merchandise; and (2) the merchandise is subject to an EUP of a lower duty rate. *See* 19 U.S.C. § 1315(d).

In this action, an "administrative ruling" did not result in the imposition of a higher rate of duty. In other words, despite plaintiffs' contentions, the protest review decisions or protest denials did not provide a new interpretation of the vessel repair statute that resulted in the assessment of higher duties. Rather, the CAFC's decision in *Texaco* mandated the change that led to higher duties.

As noted, the CAFC enunciated in *Texaco* that the "expenses of repairs" language in 19 U.S.C. § 1466(a) covers expenses which were incurred "but for" dutiable repairs. *See Texaco*, 44 F.3d at 1543-45. The CAFC's determination is a matter of law that must be followed by this Court and Customs. *See United States v. Ben Felsenthal & Co.*, 16 Ct. Cust. Appl. 15, 17-18 (1928) (holding that it is "well settled that where a court of competent jurisdiction settles and judicially defines the common meaning of a term used in a statute, such a determination and adjudication becomes [a] matter of law" and will be adhered to until a legislative change in statute necessitates a change in meaning). Where a judicial decision mandates a change in an EUP, 19 U.S.C. § 1315(d) is inapplicable. *See Westergaard, Berg-Johnsen Co. v. United States*, 17 Cust. Ct. 1, 3, C.D. 1009 (1946) (noting that 19 U.S.C. § 1315(d) is limited to an administrative ruling changing an EUP of a lower duty rate, but does not apply where the higher assessment is due to a

judicial decision). Moreover, the legislative history of 19 U.S.C. § 1315(d) expressly removes judicial decisions from the notice requirement of 19 U.S.C. § 1315(d). *See id.* Accordingly, since Customs' actions following *Texaco*, including the issuance of HQ memoranda 113308 and 113350 implementing the "but for" test and subsequent protest denials, were based on the agency complying with a judicial mandate, the Court finds that 19 U.S.C. § 1315(d) does not apply in this case on this basis alone. The Court, therefore, declines to address plaintiffs' EUP arguments under 19 U.S.C. § 1315(d).

B. Applicability of 19 U.S.C. § 1625(c)(1)

As part of their argument pertaining to their alleged second-prong of *Texaco's* "but for" test, plaintiffs also claim that Customs violated 19 U.S.C. § 1625(c) by issuing numerous protest review decisions that modified or revoked prior Customs interpretive rulings or decisions without giving interested parties notice and opportunity to comment beforehand as required under the statute.[9] *See* Pls.' Mem.

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[9] Title 19, United States Code, § 1625(c) provides in pertinent part:

(c) Modification and revocation

A proposed interpretive ruling or decision which would—

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing

Supp. Mot. Summ. J. at 15-18. In particular, plaintiffs point out that these protest review decisions (1) modified or revoked Customs HQ rulings or decisions that had been in effect for years, in violation of 19 U.S.C. §1625(c)(1); and (2) had the effect of modifying the nondutiable treatment Customs previously accorded to various vessel repair expense entries, in violation of 19 U.S.C. § 1625(c)(2). *See id.* at 17. Moreover, even if Customs' HQ memoranda 113308 and 113350 and the February 1995 meeting between Customs and plaintiffs can be construed as giving notice and opportunity to comment, plaintiffs assert that under *American Bayridge Corp. v. United States*, 22 CIT __, 35 F. Supp. 2d 922 (1998), the notice-and-comment requirements of 19 U.S.C. § 1625(c) are mandatory rather than discretionary and, thus, Customs violated the statute by failing to comply with such requirements. *See* Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 12-14.

Defendant argues that the provisions of 19 U.S.C. § 1625(c) are inapplicable here. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 32-39. In particular, defendant claims that the allegedinterpretive rulings or protest review decisions, which were unnamed and unidentified by plaintiffs, did not "modify" prior Customs rulings, decisions or treatment of vessel repair expenses; rather, the CAFC's mandate in *Texaco* did so, which Customs is bound to follow. *See* Def.'s Mem. Reply to Pls.' Opp'n to Def.'s Cross-mot. Summ. J. at 16. Indeed, defendant notes that if the alleged protest review decisions were considered to have modified prior rulings or decisions, Customs could not follow *Texaco*

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of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

19 U.S.C. § 1625(c) (1994). Section 1625, as amended by § 623 of Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2186 (Dec. 8, 1993), was not in effect at the time Customs considered the vessel repair entries in *Texaco* and, therefore, it was not part of the case's holding.

without first publishing notice and giving interested parties the opportunity to comment on whether *Texaco* was correct—an irrelevant question since Customs has no option but to observe *Texaco's* mandate. *See id.* at 16-17.

In addition, defendant asserts that plaintiffs did not meet the specific requirements of 19 U.S.C. § 1625(c)(1) in that plaintiffs failed to identify a single protest review decision that explicitly "revoke[d] a prior interpretive ruling or decision which has been in effect for at least 60 days." *Id.* at 17 (quoting 19 U.S.C. § 1625(c)(1)). Similarly, defendant claims that plaintiffs failed to identify any evidence demonstrating that the alleged protest review decisions under 19 U.S.C. § 1625(c)(2) had the effect of "modifying the treatment previously accorded by the Customs Service to substantially identical transactions" or that Customs ever issued such a "modifying" ruling. *Id.* at 18 (quoting 19 U.S.C. § 1625(c)(2)). Defendant also argues that the facts at issue here are distinguishable from *American Bayridge* and, therefore, plaintiffs erred in relying on the case. *See id.* at 19-20.

The Court rejects plaintiffs' contention that 19 U.S.C. § 1625(c) applies in this case. First, 19 U.S.C. § 1625(c) requires the Secretary of the Treasury to publish a proposed interpretive ruling or decision in the *Customs Bulletin* and to give interested parties an opportunity to comment if such a ruling or decision would: (1) modify or revoke a prior interpretative ruling or decision that had been in effect for at least 60 days; or (2) have the effect of modifying Customs' previous treatment of substantially identical transactions. *See* 19 U.S.C. § 1625(c)(1), (2). In this case, however, Customs did not issue a proposed interpretive ruling or decision within the meaning of 19 U.S.C. § 1625(c). In other words, Customs did not, on its own motion, undertake review of the dutiability of foreign repairs and propose a new interpretation of customs law; rather, the CAFC's decision in *Texaco* established a new interpretation of law that Customs is bound

to follow. The Court, therefore, concludes the protest review decisions alluded to by plaintiffs, as well as the HQ memoranda 113308 and 113350 published in the *Customs Bulletin*, were not proposed interpretive rulings or decisions; instead, such decisions and memoranda merely implemented the judicial mandate of *Texaco*.

Similarly, the Court finds that plaintiffs failed to show how the protest review decisions and the HQ memoranda modified or revoked prior interpretative rulings or decisions or modified the treatment previously accorded to substantially identical transactions. No prior interpretative rulings or decisions, for instance, were expressly discussed in either HQ memoranda.

The Court also finds that plaintiffs' insistence on a notice-and-comment period under 19 U.S.C. § 1625(c) in the instant case would serve no purpose. Section 1625(c)'s stated goal is to allow interested parties to comment on "the correctness of the proposed ruling or decision." 19 U.S.C. § 1625(c). Here, Customs did not issue a proposed ruling or decision. Further, Customs did not have any discretion with regard to the CAFC's decision in *Texaco* because Customs could not modify or reject the judicial decision. The Court, therefore, finds that requiring comments on the"correctness" of a judicial decision would be inappropriate.

As further support that 19 U.S.C. § 1625(c) excludes judicial decisions, the Court finds guidance in subsection (d) of the statute. Section 1625(d) addresses the circumstance in which Customs needs to provide a comment period with regard to a court decision. Specifically, subsection (d) provides that "[a] decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision." 19 U.S.C. § 1625(d). Subsection (d), therefore, makes clear that Customs is only required to hold a comment period with

regard to a judicial opinion if Customs seeks to limit its applicability. Where, as here, Customs plans to fully implement a judicial mandate, no solicitation of public comment is necessary.

The Court also disagrees with plaintiffs' assertion that Customs violated 19 U.S.C. § 1625(c) under the holding of *American Bayridge*. While *American Bayridge* stands for the proposition that Customs must honor the procedural requirements of 19 U.S.C. § 1625(c), the Court finds this case does not expand the scope of the statute to encompass the case at bar. In *American Bayridge*, Customs decided, on its own motion, to reinterpret the coverage of certain tariff classifications, *see* 35 F. Supp. 2d at 923-24; in this action, however, Customs merely applied a judicial decision to the vessel repair entries before it. Further, in *American Bayridge*, Customs expressly revoked an identified ruling, *see id.* at 924; whereas here, Customs' HQ memoranda and the protest review decisions took no such action. The fact that *American Bayridge* held that 19 U.S.C. § 1625(c) is mandatory does not make it applicable to cases that fall outside of its purview such as this action. Accordingly, the Court concludes that plaintiffs' reliance on *American Bayridge* is inappropriate.

V. Customs' Alleged Pro-Rata Duty Assessment of Certain Vessel Repair Expenses

Plaintiffs initially noted in their brief that an expense under *Texaco's* "but for" test is either an expense of repair or it is not, that is, the repair cannot be both dutiable and nondutiable. *See* Pls.' Mem. Supp. Mot. Summ. J. at 20. Thus, plaintiffs argued in their brief that Customs erred under *Texaco* and 19 U.S.C. § 1466(a) in assessing duties on a *pro-rata* basis to certain vessel repair entries in this case if Customs found any dutiable reason for the expense of the repair work. *See id.* at 18-21. Nevertheless, in their reply brief, plaintiffs assert that while they have identified an entry that was prorated, they acknowledge this entry does not

concern a *pro-rata* duty that conflicts with *Texaco*. *See* Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 2-3, 14. Plaintiffs, therefore, contend that their proration issue should be dismissed or severed from this action to allow them to litigate the issue in related actions which more accurately raise the issue. *See id.*

Defendant asserts that plaintiffs' proration issue should not be dismissed or severed because the issue was never raised in this action. *See* Def.'s Mem. Reply to Pls.' Opp'n to Def.'s Cross-mot. Summ. J. at 4 n.4. Moreover, defendant claims that since the issue of proration based on a misapplication of *Texaco's* "but for" test was never raised by plaintiffs in any of their entries or the complaints in this action, the Court does not have jurisdiction over the issue and, therefore, summary judgment on this matter is improper and must be denied. *See id.*

Contrary to defendant's assertion of lack of jurisdiction, the Court finds that, in general, plaintiffs raised the proration issue in this action because APL's complaint and the parties' stipulation of facts alluded to the issue.[10] Nevertheless, the Court agrees with both parties that the issue of proration based on a misapplication of *Texaco's* "but for" test was not specifically discussed in this action. Accordingly, the Court declines to address the issue and, therefore, summary judgment on the issue is denied.

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[10] *See* APL Compl. at ¶ 8 (stating that "Customs has improperly applied and impermissibly expanded the Court's ruling in *Texaco* . . . in that . . . they have apportioned duty when the 'but for' test in Texaco has been met"); Stip. Facts at ¶ 5 ("Some of the protests which are the subject of the complaints consolidated in this action relate to duty assessed to certain items on a pro rata basis apportioned by Customs to reflect what Customs alleges are the dutiable and non-dutiable foreign costs in this entry.").

CONCLUSION

For the foregoing reasons, the Court grants defendant's cross-motion for summary judgment and denies plaintiffs' motion. The action is dismissed. Judgment will be entered accordingly.

NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: September 23, 1999
New York, New York